IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1384

UNIROYAL, INC.; TIRE BRANDS, INC.; WICKLAND OIL CO.; BIG O TIRE DEALERS, INC.;

Petitioners,

vs.

JAVELIN CORPORATION,

Respondent.

BRIEF OF JAVELIN CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This Brief is submitted by respondent Javelin Corporation in opposition to a Petition for Writ of Certiorari filed by petitioners Uniroyal, Inc.; Tire Brands, Inc.; Wickland Oil Co.; and Big O Tire Dealers, Inc.[1/]

[1/] Javelin Corporation will be referred to herein as "Javelin"; Uniroyal, Inc. will be referred to herein as "Uniroyal"; Tire Brands, Inc., including its predecessors Sonic Distributors, Inc. and Olympic Distributors, Inc. (Pet. 4 n. 2), will be referred to herein as "Tire Brands"; Wickland Oil Co. will be referred to herein as "Wickland"; and Big O Tire Dealers, Inc. will be referred to herein as "Big O."

REQUEST FOR EXPEDITED DISPOSITION

Javelin requests expedited disposition of this Petition by this Court in light of the following facts. The Complaint herein was filed on January 26, 1973 (R. 1).[2]/ Formal discovery was initiated by Javelin more than four years ago (R. 360) and has not yet been completed. At the invitation of the United States District Court for the Northern District of California, defendants moved for and obtained summary judgment based on the theory of *in pari delicto* (Op. Pet. iii). Javelin appealed to the Ninth Circuit Court of Appeals which reversed in part and affirmed in part (Op. Pet. ix). When Javelin sought to resume discovery after issuance of the appellate mandate, petitioners obtained a stay of discovery. At least one potential witness has died since his participation in the conspiracy of which Javelin complains and before his deposition could be taken. The position of Javelin is that discovery in this case has been delayed long enough.

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[2]/The following abbreviations are used in this Brief:

Pet.	-	Petition for Writ of Certiorari of Uniroyal, Inc., et al.
Op. Pet.	-	Decision of Ninth Circuit Court of Appeals as reproduced in Petition of Uniroyal, Inc., et al.
J. Pet.	-	Judgment of the United States District Court for the Northern District of California as reproduced in Petition of Uniroyal, Inc., et al.
R.	-	Record on Appeal.
B.	-	Brief for Appellant Javelin to Ninth Circuit Court of Appeals.

Throughout this Brief emphasis has been supplied unless the contrary is indicated.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported officially at 546 F.2d 276 and unofficially at 1976-2 Trade Cas. ¶61,134. Reference herein to the opinion shall be to the pages of the opinion as reproduced at pages i-ix of Appendix A of the Petition. The order of the District Court as set forth at pages x-xi of Appendix B of the Petition is adequate.

JURISDICTION

The jurisdictional requisites as set forth in the Petition are adequate.

QUESTION PRESENTED

The Petition presents no issue worthy of certiorari. The decision below is consistent with relevant principles of law as articulated by this Court and as applied by other courts of appeals. Despite efforts by petitioners to transmogrify *dictum* in the opinion below into a rule "shorn of all antecedents" (Pet. 15), the holding of the Ninth Circuit was simply that "summary judgment for the defendant [*sic*] was improperly granted in this case" (Op. Pet. vi).

If certiorari were granted, the question would be: Does the equitable defense of *in pari delicto* bar the claim of a private antitrust plaintiff against the members of a conspiracy to establish and enforce an illegal *per se* exclusive territorial scheme for the sale of private brand tires where the plaintiff did not participate in the formation of the conspiracy, where the plaintiff was required to submit to

the scheme in order to be permitted to sell such private brand tires, and where the plaintiff was aware of and subject to restrictive aspects of the scheme?

STATUTES INVOLVED

The pertinent provision of the Sherman Act (15 U.S.C. §1) as set forth in the Petition is adequate. The pertinent provision of the Clayton Act (15 U.S.C. §15) is as follows:

> *Any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

This litigation arises from the activities of a group composed of several tire distributors and their tire manufacturing supplier which required member distributors "to limit their sales to the exclusive territories assigned to them under the group agreement" (Op. Pet. ii).

In 1962 Tire Brands was founded as a tire purchasing group by several tire distributors (Op. Pet. ii). At least as early as 1964 the group and its founders agreed to allocate

among themselves exclusive geographic territories for the sale of "Sonic" tires, their private brand (B. 3-4). Uniroyal manufactured "Sonic" tires and supplied them to Tire Brands (Pet. 5).

In 1967 Javelin was founded as a wholesaler of tires. Poorly capitalized at the time, the fledgling corporation needed to become a member of a private brand purchasing group (Op. Pet. ii). Javelin attempted to acquire a dependable supply of private brand tires elsewhere, but the only available supply was through Tire Brands (R. 1446). Javelin was permitted to join Tire Brands and to obtain a supply of tires, but only on the condition that it limit its sales of "Sonic" tires to a restricted territory (R. 1447). By joining Tire Brands, Javelin was able to maintain its then tenuous commercial existence. Thus, in 1968 Javelin was admitted into Tire Brands "fully aware of and subject to" the pre-existing territorial scheme (Op. Pet. ii).

Javelin designed and developed a novel and more efficient tire marketing technique; unlike other Tire Brands members which sold tires through personal calls, Javelin solicited customers and sales by telephone (Op. Pet. ii). Javelin desired to sell tires by telephone from coast to coast, but its requests for permission to sell "Sonic" tires outside of the limited area to which it had been confined were denied. As early as April, 1968, Tire Brands prohibited Javelin from selling *any* "Sonic" tires in Missouri, Illinois, part of Michigan, the Northeast and the Pacific Northwest (R. 15). From 1968 until 1970, Tire Brands restricted Javelin sales of "Sonic" tires to North Dakota, South Dakota, Minnesota, Iowa, Wisconsin and part of Michigan (R. 15). In 1970 the

area in which Tire Brands permitted Javelin to sell "Sonic" in Michigan was even further reduced (R. 16).

Despite the obvious merit of its innovative marketing technique, no Javelin representative ever achieved entry into Tire Brands' control group (R. 962). When Javelin telephone solicitations overflowed the area to which it had been limited, Tire Brands told Javelin to stop them, and Tire Brands' management clandestinely assured other members that if Javelin continued "this kind of trespassing," tire shipments to Javelin would be restricted (R. 17, B. 6-7). In December, 1972, Tire Brands expelled Javelin (Op. Pet. iii) and in January, 1973, after receiving directions from Tire Brands, Uniroyal stopped "Sonic" shipments to Javelin (R. 710-711).

Javelin filed this private antitrust suit in the United States District Court for the Northern District of California on January 26, 1973 (R. 1). The Complaint alleges violations of Sherman Act Section One in three counts. Count One alleges a conspiracy, the terms of which involved establishment of the territorial scheme described by the Ninth Circuit Court of Appeals (Op. Pet. ii), refusal to permit Javelin to sell "Sonics" outside of a limited area, and refusal to deal with Javelin (R. 6-9). Count Two alleged a conspiracy to tie the right to purchase "Sonic" products to the purchase of "Sonic" common stock (R. 9-10). Count Three is not in issue here.

Uniroyal, Tire Brands, Wickland and Big O (defendants below, petitioners here) raised as a defense the notion of *in pari delicto* (Pet. 5, 7). On January 15, 1975, defendants obtained an order granting summary judgment as to all

three counts on the basis of that defense (J. Pet. x-xi). Javelin appealed. On appeal, a three-judge panel of the Ninth Circuit Court of Appeals reversed and remanded for trial as to Counts One and Two and affirmed as to Count Three (Op. Pet. ix).

In reaching its decision as to Counts One and Two, the appellate court below applied the conservative rule that the *in pari delicto* defense does not bar an antitrust plaintiff except "where a plaintiff participated in the formation of the conspiracy" (Op. Pet. vi). The holding is limited to the following:

> Accordingly, we hold that summary judgment for the defendant [*sic*] was improperly granted in this case. (Op. Pet. vi)

The reason for this holding is that Javelin was not a participant in the formation of the illegal conspiracy (Op. Pet. vii). In adding that "[a] plaintiff is barred from recovery only when the illegal conspiracy would not have been formed but for the plaintiff 's participation," the panel apparently sought to clarify guidelines for antitrust application of the "equal fault" defense (Op. Pet. vi-vii). However, the "but for" test which petitioners misconstrue as a holding (Pet. 8, 12) is nothing more than a statement in the opinion because it applies only to participants in the formation of a conspiracy, and the record establishes that Javelin was not such a participant (Op. Pet. vii).

Petitioners now seek review by this Court of mere *dictum* in an appellate decision of a more than four year old case which has yet to be tried.

REASONS FOR DENYING THE WRIT

A. THE DECISION BELOW IS NOT INCONSISTENT WITH THE DECISION OF THIS COURT IN *PERMA LIFE*.

Petitioners do not argue that the decision below is inconsistent with the decision of this Court in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). Instead, petitioners suggest that *Perma Life* "recognizes the importance of preserving flexibility in the application of the *in pari delicto* doctrine" (Pet. 9), but that the Ninth Circuit merely conducted "the simplistic inquiry of whether the agreement would not have been formed but for the plaintiff 's participation" (Pet. 12). In this manner petitioners attempt to contrive a conflict where no conflict exists. However, as to the controlling facts upon which they rest and the policy which they advance, the *Perma Life* decision and the decision below are consistent.

1. Facts

Perma Life involved a conspiracy among a muffler manufacturer and a muffler sales organization (among others) to restrain competition by establishing an economic arrangement which included granting each franchised dealer the exclusive right to sell "Midas" products within a defined territory and preventing each such dealer from selling "Midas" products outside of his designated territory (392 U.S. 137). Plaintiffs sought to recover damages they had suffered as a result of the restrictions and defendants raised the *in pari delicto* defense. This Court held in *Perma Life* that *in pari delicto* "is not to be recognized as a defense to an antitrust action" (392 U.S. 140).

The facts which petitioners attempt to use to fabricate an *in pari delicto* defense are consistent with the *Perma Life* facts which were held not to constitute "equal fault." Furthermore, petitioners can adduce no relevant facts or combination of facts of record that were not considered in *Perma Life* and found by this Court not to amount to a defense.

Petitioners assert that Javelin contacted Tire Brands to further its economic interest by joining the preexisting "arrangement" (Pet. 5). The *Perma Life* plaintiffs also had "enthusiastically sought" to join that preexisting arrangement (392 U.S. 138). Petitioners emphasize that "Javelin joined Tire Brands 'fully aware of and subject to' " the scheme, which it considered to be " 'an advantage' " (Pet. 6). Likewise, *Perma Life* plaintiffs had "full knowledge" of the restrictive terms in their scheme, and " 'solemnly subscribed' " to its terms (392 U.S. 138). Javelin was successful, benefited from the restraints of the group, and requested the right to sell in other areas (Pet. 7). The same was true of *Perma Life* plaintiffs (392 U.S. 138).

2. Policy

Congress has explicitly given a private cause of action to "[*a*]*ny person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." (15 U.S.C. §15). Private action is "a vital means for enforcing the antitrust policy of the United States" (392 U.S. at 136). The rationale for antitrust preclusion of *in pari delicto* is that private antitrust actions promote the public interest. In *Perma Life* this Court observed that:

> [*T*]*he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.* The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. (392 U.S. 139)

Each of the four separate *Perma Life* opinions recognizes this policy.

1. Justice White, concurring:

> When those with market power and leverage persuade, coerce, or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with

> the purpose of § 4, since it will deter those most likely to be responsible for organizing forbidden schemes. (392 U.S. 145)

2. Justice Fortas, concurring in the result:

> [Plaintiffs'] right to recover in their own interest and as "private attorneys general" to enforce the antitrust laws cannot be denied on the basis of the doctrine of *in pari delicto.*
>
> * * *
>
> [L]ess-than-equal participation in the crime must not bar [plaintiff] from recovering in his own and the public interest. . . . (392 U.S. 147-148)

3. Justice Marshall, concurring in the result:

> I nevertheless agree, *because of the strong public interest in eliminating restraints on competition,* that . . . many of the variations of *in pari delicto* should not be applicable in the antitrust field. (392 U.S. 151)

4. Justice Harlan, with whom Justice Stewart joins, concurring in part and dissenting in part:

> A person who engaged in a lawful business on the terms offered should not be prevented from suing merely by his knowledge that others violated the law

> in contriving those terms. * * * That is, although a large business with the power to dictate terms and a small business that can only accept them or cease doing business may both, in principle, be liable to legal sanctions for the contract that results from the offer and acceptance, it is considered that the liability is not "*par,*" and that the business accepting dictation is only minimally blameworthy. (392 U.S. 155) [Emphasis in original.]

The decision of the Ninth Circuit reflects that very policy:

> We agree that under certain circumstances a plaintiff may be barred from recovery, but believe that the mandate of *Perma Life* and the policy behind it demand that such circumstances be rare, and limited to where a plaintiff participated in the formation of the conspiracy. (Op. Pet. vi)

Simply put, *Perma Life* and the appellate decision below are free from pertinent elements of discord.

B. THE DECISION BELOW IS NOT INCONSISTENT WITH ANY POST-*PERMA LIFE* DECISION OF ANY COURT OF APPEALS IN REGARD TO THE NOTION OF *IN PARI DELICTO.*

Since 1968, when this Court decided *Perma Life,* only nine circuit court opinions, including the opinion below, have mentioned *in pari delicto* as a defense. No such

opinions have been found from the First, Second, Third, Eighth, and District of Columbia Circuits. The appellate decision below is not inconsistent with the other eight relevant appellate decisions. All of these appellate opinions are harmonious with the statement below that there can be no "equal fault," and hence no *in pari delicto* defense, in the absence of voluntary participation by the plaintiff in the formulation of the anticompetitive scheme. The pertinent language of these opinions, organized by circuit, is as follows:

Fourth Circuit:

> [W]hen parties of substantially equal economic strength mutually participate in the *formulation* and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other.
>
> * * *
>
> [One] who *voluntarily formulates* and equally participates in a non-coercive agreement . . . cannot maintain an action under §1 of the Sherman Act. . . . [*Columbia Nitrogen Corporation v. Royster Company,* 451 F.2d 3, 15-16 (4th Cir. 1971) (holding that district court committed no error by declining to instruct the jury that counterclaimant could recover on counterclaim if it proved

a non-coercive agreement for reciprocal dealing).]

Fifth Circuit:

1. [T]he plaintiff is representative of the small businessman who acquiesces in or is coerced into a program or pattern of conduct violative of the antitrust laws because of the disproportionate bargaining power of the corporation from which he obtains most of his stock in trade.

* * *

The plaintiff . . . had *nothing to do with the creation of the arrangement*. . . . [*Greene v. General Foods Corporation*, 517 F.2d 635, 646-647 (5th Cir. 1975) (holding that *in pari delicto* did not bar plaintiff's action where plaintiff did not create arrangement and had inferior economic power), *cert. denied*, 424 U.S. 942 (1976).]

2. [A]n injured party may not be denied any recovery merely because he has participated to the extent of utilizing *illegal arrangements formulated* and carried out *by others*. . . . [*Kestenbaum v. Falstaff Brewing Corporation*, 514 F.2d 690, 695 (5th Cir. 1975) (*dictum*) (holding that plaintiff failed to establish

a net economic loss because he failed to prove the extent of benefit from the arrangement), *cert. denied*, 424 U.S. 943 (1976).]

Sixth Circuit:

Recent cases have tended to indicate that for reasons of public policy the defense of *in pari delicto* is not available to a defendant in certain types of antitrust cases. [*South-East Coal Company v. Consolidation Coal Company*, 434 F.2d 767, 784 (6th Cir. 1970) (approving jury instructions that "if the plaintiff was a *co-initiator* of the conspiracy and equally responsible therefor, plaintiff is not entitled to recover damages. . . ."), *cert. denied*, 402 U.S. 983 (1971).]

Seventh Circuit:

[P]laintiffs who do not bear *equal responsibility for creating and establishing an illegal scheme*, or who are required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants.

* * *

[E]vidence concerning the formation of the agreement including facts pertaining to which party initiated each of its provisions may control the availability of the defense. . . . [*Premier Electrical Construction Company v. Miller-Davis Company*, 422 F.2d 1132, 1138 (7th Cir. 1970) (holding that it was error for district court to grant judgment on the pleadings based on *in pari delicto*, reversing and remanding), *cert. denied*, 400 U.S. 828 (1970).]

Ninth Circuit:

1. We agree that under certain circumstances a plaintiff may be barred from recovery, but believe that the mandate of *Perma Life* and the policy behind it demand that such circumstances be rare, and *limited to where a plaintiff participated in the formation of the conspiracy*. [*Javelin Corporation v. Uniroyal, Inc.*, 546 F.2d 276, 279 (9th Cir. 1976), *cert. pending*).]

2. By their own allegations plaintiffs are the *originating, active persons responsible for . . . establishment.* * * * The complaint reveals a degree of involvement so great that it would constitute a defense to an antitrust claim. . . . [*Dreibus v. Wilson*, 529 F.2d 170, 174

(9th Cir. 1975) (holding that plaintiff's great degree of involvement constituted a bar to his claim).]

Tenth Circuit:

1. [P]articipation by a plaintiff in an illegal conspiracy in restraint of trade is not to bar him. . . . [*Semke v. Enid Automobile Dealers Association*, 456 F.2d 1361, 1369-1370 (10th Cir. 1972) (*dictum*).]

2. [T]he defense of *in pari delicto* does not defeat plaintiff's alleged cause of action as inherent in his claim and as a matter of law. [*Sahm v. V-1 Oil Company*, 402 F.2d 69, 72 (10th Cir. 1968).]

In short, as to *in pari delicto*, the appellate decision below is consonant with all other circuit court decisions.

C. THIS CASE IS NOT APPROPRIATE FOR REVIEW ON WRIT OF CERTIORARI.

Javelin brought this action more than four years ago and the case has yet to be tried. Now, at this interlocutory stage, petitioners seek Supreme Court review. However, the decision below has no general importance beyond the facts of this case. The notion of *in pari delicto* as an antitrust defense has atrophied since *Perma Life*. In addition to the nine reported circuit court cases discussed above, only fifteen reported post-*Perma Life* district court opinions have been found which mention the subject. *Perma Life* is not ripe for reconsideration. Petitioners' artifice cannot alter the simple

fact that at present this case is not appropriate for review by this Court.

CONCLUSION

For each and every reason set forth above, the Petition for Writ of Certiorari should be denied.

Dated, San Diego, California, May 6, 1977.

Respectfully submitted,

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